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No. 85-1433

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

GLORIA RICHARDSON, WARDEN
Petitioner

vs.

CLARISSA MARSH
Respondent

ON WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONER

WAYNE COUNTY PROSECUTOR'S OFFICE

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STATEMENT OF THE QUESTION

WERE ANY RIGHTS SECURED RESPONDENT BY THE CONFRONTATION CLAUSE VIOLATED AT HER JOINT TRIAL BY THE ADMISSION INTO EVIDENCE AGAINST RESPONDENT'S CODEFENDANT OF HIS REDACTED CONFESSION, WHERE THE CONFESSION AS REDACTED NEITHER IMPLICATED RESPONDENT NOR EVEN SUGGESTED HER EXISTENCE; FURTHER, UNDER CONSTITUTIONAL CONFRONTATION PRINCIPLES, COULD THE CONFESSION PROPERLY HAVE BEEN ADMITTED AGAINST RESPONDENT SUBSTANTIVELY AS A DECLARATION AGAINST PENAL INTEREST IN ANY EVENT?

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STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit of the Court of Appeals was entered on January 23, 1986. The jurisdiction of this Court is invoked under 28 USC Sec 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

> deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides, in part, that "in all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Respondent Marsh was tried jointly with her co-defendant Benjamin Williams pursuant to an information charging her with the felony murder of Ollie Scott and Koran Knighton in the perpetration of a robbery pursuant to Mich. Comp. Laws Ann. Sec. 750.316 and with assault of Cynthia Knighton with intent to murder pursuant to Mich. Comp. Laws Ann. Sec. 750.83.

Cynthia Knighton testified that on October 29, 1978, she went with her son to the house of her aunt, Ollie Scott. Knighton was upstairs with her son when she heard voices downstairs, and came downstairs and saw Martin (Marsh's boyfriend), and Marsh. Scott introduced Knighton to Marsh, they all sat down and conversed, and Marsh said she had come to pick something up. Martin pulled out a gun, pointed it at them, and said "someone had gotten killed and that my

aunt knew something about it." Marsh said something similar, and walked over to the front door. Martin grabbed Scott, and Marsh looked out the peephole. The doorbell rang and Marsh let in defendant Williams, holding a handgun. Williams said "I'm so-and-so's brother," and "[w]here's the money?"(JA 28-43)

Martin took Scott upstairs, and Williams walked through the lower level of the house, at which time Knighton attempted to flee through the front door. Marsh grabbed her and held her until Williams returned, whereupon he told the Knightons to lay on the floor (JA 47-48). Williams went upstairs and Marsh refused to give Knighton a drink of water, but looked out the peephole. When the three came downstairs, Martin gave Marsh a paper grocery bag (JA 54-55). Martin took Scott to the basement and Williams took the Knightons into the basement.

Williams said "Hurry up and tie them up," and Martin said "We're going to have to hurt them." Knighton heard two shots. Then Martin, holding a blanket in front of his gun, shot Knighton three times. Thereafter, she telephoned the police (JA 58-79). Knighton testified that Williams had a long black gun, and Martin a short, fat, shiny one (JA 41-42).

Defendant Marsh objected at trial to the introduction of Williams' statement to the police even after the references to Marsh had been deleted: "[T]here are certain inferences that are raised by this statement even in its altered form that would tend to incrimirate my client" (JA 91). The court overruled Respondent's objection and allowed introduction of Williams' statement as follows:

> On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I

received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money

> before we even got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple minutes later Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all (JA 119-123).

The court delivered the following instruction to the jury.

> The statement of co-defendant Williams has been admitted into evidence against him only. I caution you that it may be used in considering only the guilt or innocence of Defendant Benjamin Williams. Under the rules already given to you, it must not be used or considered in any way against Defendant Clarissa Marsh (JA 125-127).

Marsh testified that she met Martin in 1977 and had a relationship with him. Marsh testified that she often borrowed money so that Martin could purchase drugs. Martin lived in Marsh's house and refused to leave at her direction. Martin physically abused Marsh and in June 1978 she was hospitalized following a suicide attempt. Marsh worked with and borrowed money from Ollie Scott in the summer of 1978.

On October 29, 1978, Marsh lost her wallet with Martin's drug money at Eastland Shopping Center. Martin was upset and suggested that Marsh borrow money from Scott. After dropping her children off at a Halloween party, Marsh and Martin picked up Williams. Respondent stated that during the drive to Scott's house, she heard no conversation about a robbery (JA 171). Martin and Marsh went to Scott's house where Marsh asked for a loan. Martin

pulled a gun out and Marsh walked over to the door. Marsh testified that she looked out the door to see where the car was, that she did not feel free to leave, and that she opened the door to let Williams in. Marsh testified that she did not try to escape because she was scared and Marsh admitted that she blocked Knighton's attempt to escape but does not know why or what happened (JA 176-185). Martin came downstairs and handed Marsh a bag. Marsh testified that she never heard anything said about anyone being hurt, shot or killed (JA 186). After Martin, Williams and the victims went into the basement, Marsh left the house without the bag. Marsh testified that she never intended to rob or kill anyone, and that she did not know that anyone was armed (JA 196).

In closing argument, the prosecutor noted:

[T]he same law that applies to Mr.

> Williams applies to Clarissa Marsh as well. The People must prove the same elements that I talked about in my discussion about Mr. Williams. Her guilt, of course, is to be determined separately from the evidence but you may consider the same evidence that you heard from the witness stand. The only thing that the Court will instruct you that you cannot consider is that statement that was made by the Defendant Williams. You cannot consider that statement when you determine her guilt or innocence. To do so would be unfair (JA 318-319).

Further,

> [i]t's important in light of her testimony when she says Kareem drives over to Benjamin Williams' home and picks him up to go over. What's the thing that she says?" "Well, I'm sitting in the back seat of the car." "Did you hear any conversation that was going on in the front seat between Kareem and Mr. Williams?" "No, couldn't hear any conversation. The radio was too loud." I asked you whether that is reasonable. Why did she say that? Why did she say she couldn't hear any conversation? She said, "I know they were having conversation but I couldn't hear it because of the radio." Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that. How else do you know that she planned the robbery and

> was guilty of First Degree Felony Murder as well as the robbery? (JA 326-327).

There followed a lengthy argument that the evidence demonstrated involvement in a planned crime on the part of Marsh, the prosecutor arguing: her conduct after Kareem Martin pulled a gun demonstrated no surprise and indeed advance knowledge the event would occur; Respondent's actions in going to the door indicated she was to be a lookout, was to prevent escape, and was to let Williams into the house; that her conduct indicated she knew Williams would be coming to the door, and she admitted him without question, <u>after</u> Martin had pulled his gun; perhaps most importantly, that when Cynthia Knighton tried to escape with her son Respondent grabbed her and held her and prevented the escape; that a bag of stolen items was handed to Respondent by Martin and Williams after they came down-

stairs; and that both Martin and Williams, after having pulled weapons and started the robbery, went upstairs with Ollie Scott to search for money, leaving Respondent downstairs alone with Cynthia Knighton and her son (JA 326-335). As the prosecutor stated, Respondent's participation in the entire scheme was demonstrated by the fact that Williams and Martin "had enough confidence to leave her alone downstairs with Cynthia Knighton" (JA 334).

Defense counsel argued that "[y]ou never heard anything about anyone saying anything in her presence about hurting anyone." In its instructions to the jury, the court repeated its instruction limiting the admissibility of the Williams statement (JA 393-394).

On April 23, 1979, Williams and Marsh were convicted on all counts. On May 2, Marsh was sentenced to life imprisonment on the first and second counts and 60 to

90 years on the third count. On December 17, 1980, the Michigan Court of Appeals affirmed the convictions. The court found that malice could be inferred from Marsh's admission of Williams into the home, Marsh's holding of the grocery bag, Marsh's guarding of the door, and Marsh blocking Knighton's escape. Further, "[t]he evidence indicated that Marsh knowingly participated in an armed robbery in reckless disregard of circumstances that indicated a high degree of risk that death or serious bodily harm could result" (JA 450). The court also rejected Marsh's Sixth Amendment argument. On February 5, 1982, the Michigan Supreme Court denied Marsh's application for leave to appeal, and, on April 30, denied her motion for reconsideration.

On July 6, 1983, Marsh filed her petition for a writ of habeas corpus. On October 11, 1983, the district court

denied the petition. The Sixth Circuit Court of Appeals reversed on Sixth Amendment confrontation grounds, and this Court then granted Petitioner's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Respondent was convicted at a joint trial at which the confession of a nontestifying codefendant was admitted. That confession was redacted so as to delete not only any references to Respondent, but any indication that another actor, other than one Kareem Martin, who was still at large at the time of trial, was involved in any way in the crime, a double felony-murder, and an assault with intent to murder (as one intended victim survived).

The surviving victim testified in a manner detailing Respondent's involvement in the crime once she and Martin entered the house, including the fact that Respondent grabbed her and held her when she tried to escape with her four year old son (who was one of the murder victims), and that Respondent was left downstairs in the home alone with the surviving victim and her son while Martin

and the confessing codefendant, Williams, searched the upstairs, having taken the surviving victim's aunt, Ollie Scott, upstairs with them.

The confession of Williams indicated that the robbery-murders were planned in an auto on the way to the house in question. Respondent herself testified that she was in the auto at the time, but did not hear any conversation because she was in the back seat and the radio was on. She confirmed her participation in the house, but stated that she had been afraid of Kareem Martin.

The Petitioner submits that in this circumstance, where the redacted confession on its face does not in any way incriminate the defendant, no confrontation problems arise. There exists a strong presumption that jurors understand instructions and will follow

them. Outside of the context of Bruton v United States, where the codefendant's confession directly and powerfully incriminated the nonconfessing defendant, the presumption should be followed. This is the view of the majority of the circuits, and contrary to the view of the Sixth Circuit, which follows a doctrine of "evidentiary linkage" or "contextual implication."

Petitioner also submits that even if the presumption that jurors follow instructions is viewed as overcome in this case, Respondent's confrontation rights nonetheless remain inviolate. The codefendant's confession, as redacted or unredacted, through its content and the surrounding circumstances, demonstrated substantial indicia of reliability so as to be admissible against Respondent as a declaration against penal interest.

For these reasons, the Sixth Circuit should be reversed.

NO RIGHTS SECURED RESPONDENT BY THE CONFRONTATION CLAUSE WERE VIOLATED AT HER JOINT TRIAL BY THE ADMISSION INTO EVIDENCE AGAINST RESPONDENT'S CODEFENDANT OF HIS REDACTED CONFESSION, WHERE THE CONFESSION AS REDACTED NEITHER IMPLICATED RESPONDENT NOR EVEN SUGGESTED HER EXISTENCE, AND WHERE, UNDER CONSTITUTIONAL CONFRONTATION PRINCIPLES, THE CONFESSION COULD PROPERLY HAVE BEEN ADMITTED AGAINST RESPONDENT SUBSTANTIVELY AS A DECLARATION AGAINST PENAL INTEREST.

Introduction

On October 30, 1978, as the culmination of a robbery, and as part of a preconceived design, Ollie Scott and four year old Koran Knighton were executed. Cynthia Knighton, Koran Knighton's mother, was also an intended murder victim; however, despite having been shot three times, she survived to testify against the perpetrators of these heinous crimes. One of these, Benjamin Williams, confessed. That confession was devastating as to Williams, as it admitted his role in the events, and that it was a part of the robbery plan that the victims

be killed. The confession named Kareem Martin[1] as the shooter, and Respondent's participation in the events was fully detailed, including her presence with Williams and Martin in an auto when the robbery plan, which included killing the victims, was discussed.

To avoid severance, and yet satisfy Bruton v United States, 391 US 123 (1968), the confession was redacted. The confession was not, however, redacted by replacing Respondent's name with a letter or a neutral pronoun. Instead, all references to the participation of a person other than Williams and Martin were completely eradicated (JA 102-106). From the confession standing alone, a jury could not have known a third individual had been involved in any way in the

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[1] Kareem Martin was apprehended, tried, and convicted for these offenses approximately one year ago.

crimes, or that the confession had been at all redacted.

After an unsuccessful state appeal, Respondent's petition for habeas corpus was denied by the district court, which noted that "the redacted confession entered into evidence neither mentioned (Marsh) by name nor inculpated anyone else other than Martin" (emphasis added, Petition for Certiorari, 4A), and rejected a "contextual implication" argument. The Sixth Circuit reversed, "reject(ing) the approach which limits the appraisal of the inculpatory value of an extrajudicial statement to the face of the statement itself" (Petition for Certiorari, 50A), and observing that six circuits have taken a view contrary to that it was espousing (Petition for Certiorari, 62A-65A). The panel found "especially pertinent" to its finding of a constitutional confrontation violation "1)that the prosecution in closing

argument pointed out the impermissible linkage to the jury, 2)that the killings were discussed in the car provided evidence of Marsh's knowledge of a plan encompassing murder, and 3)that intent or malice is a critical element of both offenses under Michigan law"[2] (Petition for Certiorari, 52A).

Petitioner contends, for reasons to be detailed below, that the Sixth Circuit erred. Petitioner will argue first that the doctrine of "evidentiary linkage" or "contextual implication" embraced by the panel has no proper place in confrontation jurisprudence, particularly in a case where the codefendant's confession as redacted does not indicate even the existence of a third actor, and where the

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[2] The two offenses referred to are felony murder, and assault with intent to murder on Cynthia Knighton, as she survived the assault.

alleged linking evidence is the testimony of Respondent herself! Moreover, it will be argued that even if there is found a substantial risk that the jury disregarded two cautionary instructions and considered the codefendant's redacted confession as evidence against Respondent, confrontation principles would not be compromised, for the confession from an unavailable declarant contained substantial indicia of reliability, so as to render it, for constitutional purposes, admissible against Respondent substantively as a declaration against penal interest.

I. "CONTEXTUAL IMPLICATION" OR "EVIDENTIARY LINKAGE"

A. The Bruton Exception and its Premise

In undertaking an analysis of constitutional questions, it is always wise to keep the text of the constitutional provision involved firmly in mind, to the

end that one avoids engaging only in an interpretation of a previous analysis, which itself expressed a particular point of view, rather than an analysis of the constitution, with a result that may have little relation to the actual language of the constitution itself. Involved in this case is a confrontation question. The Sixth Amendment to the United States Constitution provides, in part, that "in all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him."

In this case the codefendant's confession was <u>not</u> admitted into evidence "against" Respondent, but was limited by the court's instructions to admission against the confessing codefendant Williams. Williams, through his confession, then, was not directly a "witness against" Respondent, given the limiting instruction, and the general rule, without which the jury system makes

little sense, is that the jury can and must be trusted to follow the court's instructions where those instructions are clear. See 391 US at 135. Indeed, in Francis v Franklin, US , 85 L Ed 2d 344, 350-360, fn 9 (1985) this Court stated that it "presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." This principle applies equally as fully in cases where the confrontation clause is implicated. See Tennessee v Street, US ; 105 S Ct 2078, 2082, fn 6 (1986); Frazier v Cupp, 394 US 731 (1969).

The issue confronted by this Court in Bruton was whether to create an exception to this rule--"whether the conviction of a defendant at a joint trial should be set aside although the jury was instruc-

ted that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence" (emphasis added, 391 US at 123-124). In Bruton the codefendant's confession named defendant as his accomplice in the armed robbery. This Court observed that if it was in fact reasonably possible for the jury to follow instructions to "disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime" (emphasis added, 391 US at 126, quoting Delli Paoli v United States), no confrontation issue would arise, because the case would be treated as if the confessor "made no statement inculpating the nonconfessor." 391 US at 126. In overruling Delli Paoli this Court determined that it is not reasonably possible for a jury to follow a limiting instruction in a case such as the one then before it, there being a

great likelihood that "the jury would believe Evans made the statements and that they were true--not just the self-incriminatory portions but those implicating petitioner as well" (emphasis added, 391 US at 127). The presumption that the jury can and will follow a limiting instruction is simply overcome in a case where the codefendant's confession is "powerfully incriminating" of the defendant, particularly given the recognized motivation to shift blame to others. See 391 US at 135-136. Bruton was thus "denied his constitutional right of confrontation" as Evans did not take the stand at trial (it should be observed that this Court carefully noted that "the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence....we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause...." 391

US at 128, fn 3, a point to which Petitioner will return in part II of the argument). See also Lee v Illinois, US ; 106 S Ct 2056 (1986), stating that the premise of Bruton was "that a confession that incriminates an accomplice is so 'inevitably suspect' and 'devastating' that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied" (emphasis added, 106 S Ct at 2063).

In Parker v Randolph, 442 US 62 (1979) this Court dealt with a variant of the factual situation presented in Bruton; namely, a case where not only had the codefendant confessed and implicated the defendant in the crime, but the defendant had also confessed, with the confessions of both defendants consistent or "interlocking." Justice Rehnquist for the plurality pointed out that the Bruton "rule" was in truth an exception to the

general rule, that rule being that a crucial underpinning of the system of trial by jury is "that juries will follow the instructions given them by the trial judge." 442 US at 73. Where the purposes of the exception are not served, the general rule prevails. Finding the premise of the Bruton exception to be, as stated in Bruton, that the jury cannot be expected to follow a limiting instruction in a case where a nontestifying codefendant has implicated the defendant, with devastating effect, and without cross-examination, the plurality held that the premise does not exist where the defendant himself has also confessed in a manner consistent with the codefendant's confession. In such a case, there is no substantial danger that the jury will disregard a limiting instruction, as it has before it the defendant's own confession.

In sum, the Bruton exception was

created to deal with a factual situation where a nontestifying codefendant had confessed and directly implicated the defendant, the premise of the holding of a confrontation violation being that a jury cannot be expected to follow a limiting instruction in this context. In Lee v Illinois, supra, this Court rejected the state's characterization of "the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 106 S Ct at 2064, fn 5. Although Lee involved the direct substantive use of a codefendant's confession (rather than the "indirect" use of Bruton by the presumed failure of a jury to regard a limiting instruction), the point made defines Bruton as well--that case

also involved "a confession by an accomplice which incriminated a criminal defendant."

B. Redaction and "Evidentiary Linkage"

In keeping with the well-established preference for the efficiency of joint trials, see e.g. United States v Cleveland, 590 F 2d 24,29 (1978), alternatives to severance as a remedy to perceived Bruton problems were sought. One such solution, widely employed, is redaction, involving the elimination from the codefendant's confession of at least all direct references to the defendant (or, as in this case, the elimination of any and all indications that another person was at all involved in the offense), and the substitution of a symbol or neutral pronoun; indeed, redaction had been required by some courts prior to Bruton, see 391 US at 134, fn 10 (another solution is the empaneling of joint juries, with the jury

hearing the nonconfessing defendant's case being excused while the confession of the confessing defendant is admitted against him before his jury).

Arguments began to arise that by reference to other admissible evidence presented in the case it was possible for the jury to infer that the individual referred to by use of a symbol or neutral pronoun in the codefendant's confession was in fact the defendant, and even that confessions not referring to another actor were inculpatory of the nonconfessing defendant when taken in conjunction with other evidence. Varying responses to these arguments have been made by the different circuits, distilling essentially to the following three positions:

> 1) <u>The Sixth Circuit position (taken in this case)</u>: to support a confrontation violation the out-of-court statement must, in context, considering all the evidence in the case, clearly implicate the

defendant, and create a substantial risk that the jury looked to the incriminating extrajudicial statement in determining guilt.[3]

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[3] See e.g. the opinion in this case; Hodges v Rose, 570 F.2d 643, 646 (6th Cir.), cert. denied, 436 U.S. 909 (1978); United States v Pickett, 746 F.2d 1129, 1133 (6th Cir. 1984), cert. denied, 105 S. Ct. 1222 (1985); Elliott v Thompson, 599 F.2d 767, 769 (6th Cir.), cert denied, 444 U.S. 932 (1979); United States v Marks, 585 F.2d 164, 168 (6th Cir. 1978); Burkhart v Lane, 574 F.2d 346, 348 (6th Cir. 1978); Poole v Perini, 659 F.2d 730, 733 (6th Cir. 1981), cert. denied, 455 U.S. 910 (1982); Lyle v Koehler, 720 F.2d 426 (6th Cir. 1983) (Petitioner would submit that Lyle is actually a direct reference case; where a codefendant is referred to by an identified nickname, the situation is no different than where he has been referred to by name; Petitioner nonethless submits that Lyle was wrongly decided for the reasons stated in the dissent in that case).

2) The Seventh Circuit position: to support a confrontation violation the out-of-court statement must, in context, considering all the evidence in the case, be powerfully incriminating of the defendant and vitally important to the government's case.[4]

3) The Third Circuit, and majority view: to support a confrontation violation the out-of-court statement must, standing alone, clearly implicate the defendant without reference to other independently admissible evidence.[5]

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[4] See English v United States, 620 F.2d 150, 152 (7th Cir.), cert denied, 449 U.S. 859 (1980); United States v Key, 725 F.2d 1123 (7th Cir. 1984).

[5] See Serio v United States, 401 F.2d 989 (D.C. Cir. 1968); United States v DiGregorio, 605 F.2d 1184, 1190 (1st Cir.), cert. denied, 444 U.S. 937 (1979) ("[W]here the confession does not name a codefendant, it may be admitted ... solely against the confessor, and a limiting instruction does serve to reduce any prejudicial inferences the jury might draw."); United States v Greenleaf, 692 F.2d 182, 189 (1st Cir. 1982), cert. denied, 103 S. Ct. 1522 (1983);

The differences between the Sixth and Seventh Circuit views, while significant, are not striking, the Sixth Circuit rejecting the Seventh Circuit rule that the confession must be vitally important to the government's case, and the Seventh Circuit requiring that the context compel the inculpatory inference rather than simply permit it. Both of these views are diametrically opposed to the Third Circuit view that the confrontation question addressed in Bruton must be

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[5] cont'd. United States v Cleveland, 590 F.2dd 24, 27-28 (1st Cir. 1978); United States v Porter, 764 F.2d 1 (1st Cir. 1985); United States v Wilinson, 754 F.2d 1427, 1435 (2d Cir.), cert. denied. 105 S. Ct. 3482 (1985); United States v Burkee, 700 F.2d 70, 85 (2d Cir.), cert denied, 464 U.S. 8116 (1983); United States v Slocum, 695 F.2d 650, 655 (2d Cir. 1982), cert. denied, 460 U.S. 1015 (1983) ("Where...the inculpatory impact upon the defendant of the statements is defused because it depends upon

reviewed by reference to the redacted confession standing alone.

There are, as noted in the opinion of the Sixth Circuit in this case, a myriad number of cases involving the above-stated positions. Close analysis of two will suffice to set forth the principle justifications for the positions taken.

1) The Third Circuit and Majority View: United States v Belle

The Third Circuit and majority view, that to support a confrontation violation

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5 cont'd. other prosecution evidence to connect the defendant to the subject of the statements, the Bruton rule is not violated."); United States v Marin, 669 F.2d 73, 83 (2d Cir. 1982); United States v Knuckles, 581 F.2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978); United States ex rel. LaBelle v Mancusi, 404 F.2d 690 (2d Cir. 1968); United States v Webster, 734 F.2d 1048, 1054 n.6 (5th Cir. 1984), cert. denied. 105 S. Ct. 2340 (1985); United States v

the out-of-court statement must, standing alone, clearly implicate the defendant without reference to other independently admissible evidence, is best expressed in United States v Belle, 593 F 2d 487 (CA 3, 1979), expressing the view of the entire circuit sitting en banc. In that case defendant's codefendant, Munford, made a statement. A DEA agent testified

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5 cont'd. Heffington, 682 F.2d 1075, 1083 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v Castro, 596 F.2d 674, 677 (5th Cir.), cert. denied, 444 U.S. 963 (1979); United States v Stewart, 579 F.2d 356, 359 (5th Cir.), cert. denied. 439 U.S. 936 (1978); United States v Tavelman, 650 F.2d 1133, 1139 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982); United States v Wright, 742 F.2d 1215, 1223 (9th Cir. 1984); United States v Satterfield, 743 F.2d 827, 849 (11th Cir. 1984), cert. denied, 105 S. Ct. 2362 (1985); United States v Garrett, 727 F.2d 1003, 1013 (11th Cir. 1984), aff'd. 105 S. Ct. 2407 (1985).

to the statement, which revealed that Munford was going to deliver heroin between 8:00 and 8:30 p.m. on a particular date to a particular place. Munford further stated that two or three times in the past he had transported heroin into the same area and on two occasions had met with one O'Neil Roberts. A limiting instruction was given.

On appeal Belle contended that Munford's reference to prior meetings with O'Neil Roberts, to having transported heroin into that area before, and to the location of the delivery on this particular occasion, were inculpatory of Belle. It was argued that inculpatory inferences could be drawn from Munford's statement taken in conjunction with other evidence, primarily that Munford and Belle had been observed in a Lincoln in the parking lot by the place in question; that Belle made a hand signal to another

vehicle, a Cadillac, at which time both vehicles left the lot, one following the other; that the vehicles later stopped and Belle went to the Cadillac and entered it; that Munford was then seen retrieving from under the hood of the Lincoln packages of a sort commonly used for packaging heroin; and that when the Cadillac was then stopped Belle was the passenger and O'Neill Roberts was the driver.

The Third Circuit prefaced its analysis by stating

> In essence, Belle is asserting that whenever a codefendant (here Munford) incriminates himself in a statement which by its express terms does not mention or refer to a joint defendant (here Belle) the Bruton rule will preclude its admission into evidence in a joint trial if there is any other evidence which links the complaining defendant (Belle) to the substance of the statement. We cannot agree as we do not believe that the Supreme Court in Bruton ever intended such a far-reaching result. 593 US at 493.

The court found that the "key" to the

creation of the Bruton exception was that the extrajudicial statement by the nontestifying codefendant was "powerfully incriminating" in that it named the nontestifying codefendant as an accomplice. Where the extrajudicial statement--"and we emphasize, the statement only" (emphasis in original, 593 F 2d at 493)--does not directly implicate the nonconfessing codefendant, the premise for the Bruton exception does not exist. The court went on to note that many courts have consistently approved use of codefendant's confessions after redaction which does not explicitly suggest the participation of the complaining defendant, and that if admission of this sort of redacted statement is permissible, certainly admission of a statement "which makes no reference whatsoever to any other defendant should be admissible as well....In short, evidentiary linkage or

contextual implication may not be utilized to convert a non-Bruton admissible statement into a Bruton inadmissible statement." 593 F 2d at 494.

The court did not rest its analysis there. The court further observed that it could find no evidence in the Bruton opinion that "linkage evidence" was subsumed by its ruling. If such evidence was intended to be subsumed by Bruton, then on a motion for severance the trial court would be required to inspect all prosecution evidence along with the confession, whereas FRCP 14 regarding severance specifically authorizes the trial judge making the severance decision to require the government to deliver for in camera inspection only any confessions or statements by the defendants.

> ...such a result would require the trial judge to examine under a microscope all the prosecution's evidence in order to determine whether any extrajudicial statement made by a nontestifying codefendant

> could be admitted as to that defendant, or whether it would have to be excluded because of the existence of independent 'linkage' evidence which might connect another defendant to the statement. This result would necessarily lead to either a complete 'mini-trial' before the judge, or to the practical prohibition of joint trials....The federal rules do not contemplate such a practice....Bruton itself never suggested such an astonishing result.... 593 F 2d at 496.

2) The Sixth Circuit View: The Instant Case

The Sixth Circuit view is perhaps best represented by the opinion of the panel in the instant case. The panel paid lip service to the principle that there is a strong presumption that jurors can follow the court's instruction, and that the Bruton rule is an exception to the rule--an example of a situation where the presumption is overcome. The panel also acknowledged that "other circuits have generally disapproved of looking beyond the face of the contested extrajudicial statement in determining its incrimina-

tory value, labeling such practice as contextual implication or evidentiary linkage." Petition for Certiorari, 47A. The panel rejected this approach on the ground that it "ignores the true incriminatory effect of the statement....(and) sanction(s) the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant...." Petition for Certiorari, 50A. The court took particular issue with what it called the "strident" statements of Belle barring evidentiary linkage, stating in response to the analysis in Belle regarding the impracticability of making intelligent pretrial severance rulings if a doctrine of evidentiary linkage is recognized that "We, of course, have little to add to the Supreme Court's rejection of a similar argument in Bruton See...Bruton, 391 US at 135." Petition for Certiorari, 62A.

The panel found evidentiary linkage which resulted in a substantial risk that the jury would be unable to follow the cautionary instructions given in that, though the redacted confession did not even indicate the existence of a criminal participant other than Williams and Martin, Respondent's own testimony placed her in the auto at the time when Williams' confession indicated the robbery and murder plan was discussed. While recognizing that "the value of cross-examining herself, of course, is non-existent," the panel found a confrontation violation because Respondent was unable to challenge what happened in the car on the way to the robbery absent cross-examination of Williams (Respondent had testified that she was in the back seat of the auto and the radio was on, and she could not hear anything said between Williams and Martin). Key to the panel's determination that Respondent's

own testimony, linked with the redacted confession, was "powerfully incriminating" of her were 1)the prosecutor's statement in closing argument "Why did she say she couldn't hear any conversation? She said 'I know they were having conversation but I couldn't hear it because of the radio.' Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that"; 2)that the killings were discussed in the car provided evidence of Respondent's knowledge of a plan encompassing murder, and 3)that malice is a critical element of murder under Michigan law. Petition for Certiorari, 52A. The panel also found that the instant facts were most analogous to United States v Gonzalez, 555 F 2d 308 (CA 2, 1977). There, the codefendant's statement indicated that a particular set of keys belonged to the person who gave him

cocaine. An FBI agent testified that those keys fit Gonzalez' apartment, and the prosecutor argued the inference that the keys were therefore Gonzalez', and Gonzales therefore gave the cocaine to the codefendant.

Concluding, then, that the redacted statement, taken in conjunction with Respondent's testimony, was powerfully incriminating of her, the panel found that there was a substantial risk the jury disregarded the cautionary instructions and considered the statement as substantive evidence against Respondent, in violation of the confrontation clause as construed in Bruton.

C. Analysis and Application

1) Analysis

It is submitted that the Third Circuit/majority view is the correct one, and that the Sixth Circuit, in endorsing a doctrine of contextual implication, particularly under the facts of this

case, failed to pay proper deference to the presumption which is the cornerstone of the system of trial by jury, that the jurors can and will follow instructions given them by the court. It must be remembered that the rule is that jurors can and will follow instructions, and that Bruton is the exception to the rule. The Bruton exception was created and applied in a situation where the codefendant's confession on its face was powerfully incriminatory of the nonconfessing defendant, naming him as a coparticipant in the crime. It was in that specific context that this Court found the presumption that jurors follow instructions overcome.

The presumption, being key to the operation of the jury system, should not be cast aside in a situation falling outside the facts and rationale of Bruton. A part of our system of trial by jury, and of the law of evidence, is the

concept of limited admissibility, recognized even in the Federal Rules of Evidence. See FRE 105. It is understood that on many occasions evidence may be admissible as to one party and not another, or for one purpose and not another, and yet the evidence is admissible at trial, the duty of the trial judge being to "restrict the evidence to its proper scope and instruct the jury accordingly," FRE 105, the duty of the jury being to follow the instruction. This concept, and the presumption that jurors follow limiting instructions, is applied in many difficult situations: the very confession of the defendant may be inadmissible against him to prove the crime charged against him due to a defect in Miranda warnings given him, yet if he testifies inconsistently with the confession, the jury will hear the admission of guilt he made, and be instructed to consider it only on the

issue of his testimonial credibility, and not as proof of his guilt. And the jury is trusted to draw this distinction. Similarly, evidence of other crimes or bad acts may be admitted against the defendant to show a common scheme or plan, and the jury is instructed to consider that evidence for only that purpose, and not as evidence that defendant must be guilty because he is a "bad man," or simply because he had committed other offenses in the past. And the jury is trusted to draw this distinction. It may be that a defendant's testimonial credibility is impeached through evidence of prior convictions, and the jury is instructed to consider only the impact of the convictions on his credibility, and not to use them as evidence of guilt. Again the jury is trusted to draw this distinction. The presumption that jurors follow instructions should not be

overcome, then, when the confession of a codefendant is admitted under a limiting instruction that it may not be considered as evidence against the defendant, where that confession does not, on its face, directly and powerfully incriminate the defendant. Petitioner submits that a rule which readily casts aside the presumption that jurors can and do follow the law is representative of an elitist view of the law, and runs counter to the deservedly exalted position the principle of trial by jury is given in our system of justice.

Moreover, Petitioner would submit that the practical concerns advanced by the Third Circuit in Belle regarding the impossibility of intelligent severance decisions under a doctrine of contextual implication have great force. Bruton did not envision a trial before the trial to determine if, from all the prosecution evidence, and from evidence from the

defense, including the proposed testimony of the defendant him or herself, it is possible for the jury to draw an inculpatory inference from the codefendant's confession when it is juxtaposed with other evidence in the case. The Sixth Circuit's rejoinder to this argument, "We, of course, have little to add to the Supreme Court's rejection of a similar argument in Bruton See...Bruton, 391 US at 135," simply will not do. In the cited reference to Bruton this Court rejected an argument that the benefits of joint proceedings "should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant," 391 US at 134, finding that the advantage of joint trials could be overcome by principles of confrontation, but only in those "contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital

to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 US at 135-136.

The majority also stated that an argument that the Bruton rule would mean that the prosecution would be "denied the benefit of the confession to prove the confessor's guilt," 391 US at 133, was fallacious, noting that "it overlooks alternative ways of achieving that benefit without at the same time infringing the nonconfessor's right of confrontation," pointing to the alternative of redaction! 391 US at 133-134. The doctrine of contextual implication would mean that there is no practical alternative to severance, and that where there is a joint trial and one defendant has confessed, severance must be granted, for the practical concerns advanced by Belle are persuasive, particularly in the context of this case. If the testimony of the nonconfessing defendant can ever

be considered as the linking evidence to the codefendant's confession, so as to overcome the presumption that the jury will follow limiting instructions, then there can be no such thing as redaction, for in advance of trial the defendant's testimony will not be known, nor, in cases where the linking evidence may or may not exist in other proofs, will the trial judge have access to all the evidence.

Petitioner submits, then, that the necessary and weighty presumption that jurors can and will follow limiting instructions prevails unless overcome, and that in the context of the admission of a nontestifying codefendant's confession at a joint trial the presumption prevails unless the confession on its face is directly and powerfully incriminatory of the nonconfessing defendant. Any other rule would mean that a joint trial may not be had in any case where a

defendant has confessed, unless the prosecution foregoes use of the confession.

2)Application

If this Court accepts the view of the Third Circuit, which is the view of the majority of circuits, then plainly severance was properly denied in this case, as on its face the redacted confession does not even indicate that any individual other than Kareem Martin was involved in any way in the crime here. Moreover, even if a doctrine of contextual implication or evidentiary linkage is recognized, it should not cause reversal of Respondent's conviction.

As indicated previously, the Sixth Circuit in this case found three points "especially pertinent" to its decision: "1)that the prosecution in closing argument pointed out the impermissible linkage to the jury, 2)that the killings

were discussed in the car provided evidence of Marsh's knowledge of a plan encompassing murder, and 3)that intent or malice is a critical element of both offenses under Michigan law." None of these considerations, individually or collectively, is persuasive.

First, the court found that the prosecutor "pointed out the impermissible linkage to the jury" with the following remark: "Why did she say she couldn't hear any conversation? She said 'I know they were having conversation but I couldn't hear it because of the radio.' Because if she admits that she heard the conversation and she admits to the plan, she's guilty of at least armed robbery. So she can't tell you that." But Respondent <u>had</u> herself testified that she was in the auto when the conversation occurred, and the prosecutor's brief comment on it was apt. Moreover, the prosecutor did <u>not</u> argue that Respondent

was involved in the plan because of the discussion in the auto. The Sixth Circuit quotation of the remark takes it out of its context. Directly after the quoted remark, the prosecutor continued "How else do you know that she planned the robbery and was guilty of First Degree Felony Murder as well as the robbery?" (JA 327). There continued a lengthy analysis of Respondent's conduct during the events (which the prosecutor had started before the remark quoted by the Sixth Circuit), which the prosecutor argued demonstrated her guilt and involvement, including: her conduct after Kareem Martin pulled a gun demonstrated no surprise and indeed advance knowledge the event would occur; Respondent's actions in going to the door indicated she was to be a lookout, was to prevent escape, and was to let Williams into the house; that her conduct indicated she knew Williams would be coming to the

door, and she admitted him without question, after Martin had pulled his gun; perhaps most importantly, that when Cynthia Knighton tried to escape with her son, Respondent grabbed her and held her and prevented the escape; that a bag of stolen items was handed to Respondent by Martin and Williams after they came down stairs; and that both Martin and Williams, after having pulled weapons and started the robbery, went upstairs with Ollie Scott to search for money, leaving Respondent downstairs alone with Cynthia Knighton and her son (JA 327-335). As the prosecutor stated, Respondent's participation in the entire scheme was demonstrated by the fact that Williams and Martin "had enough confidence to leave her alone downstairs with Cynthia Knighton" (JA 334). The argument regarding Respondent's involvement and the inferences as to advanced planning

were scarcely based, then, on Williams' confession.

Petitioner would also point out that this case involves a habeas corpus proceeding. There was no objection to the remark quoted by the Sixth Circuit at trial, nor was it raised in the Michigan Courts. It should not be considered now.

As to the statement by the Sixth Circuit "that the killings were discussed in the car provided evidence of Marsh's knowledge of a plan encompassing murder," it must be remembered that Marsh herself placed herself in the car when the discussion took place--absent her own testimony, there would have been no such evidence. Petitioner has argued above that if the defendant's own testimony may serve as linking evidence, then there is no such thing as redaction.

Finally, with regard to the Sixth Circuit's observation that "intent or malice is a critical element of both

offenses under Michigan law," the statement is true in so far as it goes, but it does not mean that a premeditated homicide is required for felony-murder in Michigan. What is required is malice; that is, that the defendant either intended to kill, intended to do great bodily harm, or acted with wanton and wilful disregard of the likelihood that death or great bodily harm would result (and that the homicide occurred during the course of a statutorily enumerated felony). See People v Aaron, 409 Mich 672, 733 (1980). The manner in which the felony was committed may allow an inference of wanton and wilful disregard, particularly where a weapon is employed. See People v Woods #2, 124 Mich App 645 (1983); Aaron at 729-730. In short, that malice is required for felony-murder has no special relationship to the fact that Williams' confession also demonstrates that the crime was not only a felony-

murder, but a premeditated murder as well.

Petitioner would submit, then, that absent a doctrine of contextual implication or evidentiary linkage no Bruton problem exists in this case, and that even under a doctrine of contextual implication it should not be said in this case that the confession was "powerfully incriminating" of Respondent, so as to overcome the presumption that the jury followed the limiting instructions. There simply is no reason why a mistrust of the jury should exist in this situation.

II. THE CODEFENDANT'S CONFESSION IN THIS CASE WAS ADMISSIBLE AGAINST RESPONDENT AS A DECLARATION AGAINST PENAL INTEREST

If this Court determines that under the facts of this case the presumption that the jury could follow the limiting instructions regarding the evidentiary use of the codefendant's confession has

been overcome, the inquiry has only begun, for if this case is to be treated as one where the codefendant's statement was considered substantively against Respondent, there remains the question of whether substantive use of the statement would deny Respondent's confrontation rights. Petitioner submits that it would not.

It must be remembered that this Court in Bruton was careful to note that "the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence....we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause...." 391 US at 128, fn 3. At the time Bruton was decided the Federal Rules of Evidence were not yet in place, and, despite the strenuous objections of evidence scholars and commentators, see e.g. McCormick, Evidence (2d Edition), p.673-675, the

declarations against interest hearsay exception was generally held to apply only to declarations against pecuniary interest. With the acceptance of declarations against penal interest as a hearsay exception, the contours of Bruton require reexamination.

A. The Jurisprudence of Confrontation

The argument that the confrontation clause is absolute, and that thus no hearsay can ever be admitted into evidence, has never been accepted. It has also been argued that the confrontation clause constitutionalized the hearsay rule as it existed at the time of the adoption of the Sixth Amendment. This view is equally untenable. The law of evidence is still subject to thoughtful alteration.

In Pointer v Texas, 380 US 400; 13 L Ed 2d 923; 85 S Ct 1065 (1965) it was held that the introduction at trial of an unavailable witness's examination testi-

mony was constitutionally impermissible where defendant had no counsel at the examination and no opportunity to cross-examine the witness. Speaking for the Court Justice Black noted:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. 13 L Ed 2d at 926.

This sweeping language must, however, be viewed as dicta, and as dicta impliedly rejected by later cases, for if taken as written it would outlaw the use of hearsay statements, including those within the recognized exceptions.

That confrontation cannot so readily be equated with cross-examination; indeed that confrontation cannot be viewed as cross-examination with the exception of those hearsay exceptions recognized at the time of the adoption of the Sixth Amendment, is apparent from California v

Green, 399 US 149; 26 L Ed 2d 489; 90 S Ct 1930 (1970). Involved was a California statute which allowed the prior inconsistent statements of a witness testifying at trial to be admitted as substantive evidence. The Court noted that the generally recognized purpose of the confrontation clause is to prevent trial by ex parte affidavit. Justice White, speaking for the majority, went on to discuss the relationship between the confrontation clause and hearsay rules:

> While it may readily be conceded that the hearsay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law....merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. 26 L Ed 2d at 495.

Justice White further remarked that even

had the witness not been present at trial, his prior statement, in the form of examination testimony, could have been admitted as substantive evidence without constitutional difficulty, because at his examination his counsel was not "significantly limited in any way in the scope or nature of his cross-examination of the witness...." 26 L Ed 2d at 501.

In a thoughtful concurrence Justice Harlan observed that the decision of the California Supreme Court was the result of decisions of the United States Supreme Court which "indiscriminately equated 'confrontation' with cross-examination'":

> If 'confrontation' is to be equated with the right to cross-examine, it would transplant the ganglia of hearsay rules and their exceptions into the body of constitutional protections. The stultifying effect of such a course upon this aspect of the law of evidence in both state and federal systems need hardly be labored, and it is good that the Court today, as I read its opinion, firmly eschews that course. 26 L Ed 2d at 505.

Justice Harlan went on to call for a

"fresh look" at the constitutional conception of confrontation.

In Dutton v Evans, 400 US 74; 27 L Ed 2d 213; 91 S Ct 210 (1970) the Court once again wrestled with the relationship between the confrontation clause and cross-examination. A Georgia statute, which allowed admission as substantive evidence statements of a coconspirator during the "concealment phase" of the conspiracy, was attacked on confrontation grounds. Justice Stewart, writing for a four justice plurality, with Justice Harlan concurring, stated that:

> The decisions of this court make it clear that the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement.' (27 L Ed 2d at 227, citing California v Green, emphasis added).

The Court held that:

> From the viewpoint of the Confrontation Clause, a witness under

> oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but what he has heard. 27 L Ed 2d at 226.

Justice Harlan, in his concurring opinion, continued his "fresh look" at confrontation, reaching the conclusion that the position espoused by Wigmore is the correct view:

> The Constitution does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infra-judicially, - this depends on the law of Evidence for the time being - but only what mode of procedure shall be followed i.e. a cross-examining procedure - in the case of such testimony as is required by the ordinary law of evidence to be given infra-judicially (emphasis added). 5 Wigmore, 1397, p. 131.

Justice Harlan, then, reached the position that questions of hearsay exceptions and the absence of cross-examination are not Confrontation Clause problems at all, but due process problems. 27 L Ed 2d at 231.

Another case indicating that the

mission of the confrontation clause is not solely cross-examination is Mancusi v Stubbs, 408 US 204; 33 L Ed 2d 293; 92 S Ct 2308 (1972). The case dealt with the use of prior recorded testimony, and the Court stated:

> The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' (citations omitted).

The Court found the cross-examination adequate so as to give the testimony "sufficient indicia of reliability" and afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." 33 L Ed 2d at 303.

A more recent case in the area is Ohio v Roberts, 448 US 56; 65 L Ed 2d 597; 100 S Ct 2531 (1980), another prior recorded testimony case. The Court observed that

the Confrontation Clause reflects a "preference" for face-to-face confrontation at trial, and that a primary interest it secures is that of cross-examination. However, this preference may be overcome, principally upon a showing of sufficient indicia of reliability.

In United States v Inadi, US ; 106 S Ct 1121 (1986) this Court considered the constitutionality of FRE 801(d)(2)(E), the coconspirator's declarations hearsay exception, in that the Rule does not require unavailability. Holding that "Roberts cannot fairly be read to stand for the radical proposition that no out-of-court-statement can be introduced by the government without a showing that the declarant is unavailable," 106 S Ct at 1126, the Court upheld the Rule (See also New Mexico v Earnest, US ; 39 Cr L 3252 (1986), Justice Rehnquist concurring for four members of the Court with

the remand for further proceedings not inconsistent with Lee v Illinois, infra, observing that under this Court's recent cases "a lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause....the State is entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns").

B. Lee v Illinois

Central to an analysis of the confrontation implications of substantive admission of the codefendant's confession as against Respondent in this case is the recent decision in Lee v Illinois, US ; 106 S Ct 2056 (1986). In Lee the trial judge, at a bench trial, expressly relied upon portions of the codefendant's

confession in finding defendant Lee guilty of murder. The codefendant, Thomas, had implicated both himself and defendant in the crimes, and the only apparent theory of admissibility of his statement against defendant was the declarations against penal interest exception. Justice Brennan for a five member majority declined to accept the state's characterization of "the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 106 S Ct at 2064, fn 5. In other words, Lee involved a declaration against penal interest, but a particular kind or sort of declaration against penal interest; namely one which declares not only that the declarant is guilty of criminal

conduct but that another party is also. Under these circumstances, the majority found that the State's "grounds for holding Thomas' statement to be reliable with respect to Lee's culpability" did not meet the Confrontation Clause standard of demonstrating substantial indicia of reliability.

This Court found reliability lacking primarily due to its conclusion that there was a clear divergence between the confession of the codefendant and that of the defendant as to the participation of the parties in the murders--"The discrepancies between the two go to the very issues at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie." 106 S Ct at 2065. Because, then, of these conflicts, and the well-recognized motivation to shift blame or curry favor, the majority was "not convinced that there exist

sufficient 'indicia of reliability,' flowing from either the circumstances surrounding the confession or the 'interlocking' character of the confessions, to overcome the weighty presumption against the admission of such uncross-examined evidence." 106 S Ct at 2065.

Justice Blackmun, for a four member dissent, observed that in Bruton the inadmissibility of the codefendant's statements as against the defendant was not contested, and that Bruton therefore only applies to "situations in which the out-of-court statements are constitutionally inadmissible against the defendant," and disagreed with the majority conclusions as to reliability, stating that in the case before the Court "there is little reason to fear that Thomas' statements to the police may have been motivated by a desire to shift blame to petitioner." 106 S Ct at 2068. Justice

Blackmun concluded that "in this case the practical unavailability of petitioner's codefendant as a witness for the State, together with the unusually strong and convincing indications that his statements to the police were reliable, rendered the confession constitutionally admissible against petitioner." 106 S Ct at 2071.

C. The Instant Case

The codefendant's statement, in its original (with the portions subsequently redacted in boldface), read as follows:

> On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. he said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem and Clarissa, who I call "KC", who is Kareem's girl friend, came by in his black Monte Carlo car. I got in the car and Kareem and Clarissa told me he was going to stick up this crib where the

lady knew them. Clarissa said told me the place was a numbers house where she used to work and the lady knew her so there would be no trouble getting in because she owed her a hundred dollars and she would let them in. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said that the (sic) would have to take them out after the robbery because they knew them. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I was supposed to wait outside until they got inside and then KC (Clarissa) was supposed to come out on the porch and let me know that Kareem had stuck the place up. Wait a minute, The plan was that I would wait in the car in front of the house until KC signaled me and the (sic) I would move the car down across the big street because they he didn't want anybody to see the car. Okay, Kareem and KC went up to the house and went inside. A couple of minutes later KC came out on the porch and waived. I moved the car and went up to the house. I knocked on the door and KC opened the door. As I entered, Kareem and this older lady were in the dining-room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor and KC.

After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we even got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. **Before Kareem took the lady upstairs, the lady was asking Clarissa, 'why are you doing this to me?' Clarissa didn't answer as** I recall. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. **A couple of minutes later KC came to the car. She got behind the wheel and drove the car around the corner from the house and parked on the big street.** A couple of minutes later, Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all. (JA 102-106)

Deleting the boldface redacted portions of the statement, then, the

statement as admitted read as follows:

> On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. he said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the diningroom, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He

> had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we even got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, "Let's go, let's go." Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple minutes later Kareem came to the car and said he thinks that the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all.

Petitioner submits as redacted, and even as unredacted, the confession was admissible against Respondent as substantive evidence without violation of Confrontation Clause principles.

First, was the confession, in its original form, as given to the police, against Williams' penal interest? It was devastating to his defense. He admitted that he was called by Kareem Martin for the express purpose of assisting in an armed robbery; that after he was picked up by Martin and Respondent the place of the robbery was discussed, as well as the plan of entry, and the items to be stolen; that Martin stated that the occupants of the house would have to be killed as a part of the robbery; and that Martin gave him a gun and possessed a gun himself. He also confessed to going into the house as planned and assisting in the robbery, stating that Kareem Martin did the killings (a fact corroborated by the surviving victim, and to be discussed subsequently). There is no question but that by his confession Williams admitted being a participant in an armed robbery which had, as a preconceived design, the

execution of the victims of the robbery. The statement is highly reliable.

What of the principal concern of the majority in Lee; namely, the motivation to shift blame? There was no attempt to shift blame to Respondent. Williams detailed her participation--her presence in the auto, her involvement in the discussion of the plan for the robbery including that the method of entry was keyed on the fact that one occupant, Ollie Scott, knew Respondent; and her admission of Williams into the house after Martin and Respondent had already entered. None of this description of Respondent's involvement in the events in any way shifted Williams' responsibility or diminished it one whit. The only possible "blame shifting" in the statement appears where Williams states that the killings were carried out by Martin. But this claim is consistent with the testimony of the surviving

victim, Cynthia Knighton. The only discrepancy is that Williams' confession attempts to mitigate his moral culpability to a degree by stating that he was not present when the murders were carried out, whereas Cynthia Knighton testified that he was. But this mild attempt to place himself in a better light in no way mitigated Williams' responsibility--he assisted in the crime knowing murder and robbery were the objects of the enterprise, and he did not indicate any abandonment on his part; he waited in the vehicle, and was supposed to "split the take" with Martin the next day. Any presumption of unreliability should be viewed as overcome on these facts.

But there is even more evidence demonstrating the reliability of the confession (as unredacted); namely, the testimony of Cynthia Knighton. Ms. Knighton's testimony corroborates

Williams' confession in many details: she testified that Martin and Respondent entered the house before Williams; she testified that Williams was admitted by Respondent after the robbery had begun; she testified that Martin initially went upstairs with Ollie Scott to search for money, and that Williams went upstairs subsequently; she testified that Williams had a handgun which was "black and long" and that Martin had a "short, fat, shiny, handgun" (the confession states that "Kareem had a big silver gun. He gave me a long barrelled .22 revolver"); and she testified that Martin did the shootings.

It is submitted, then, that the difficulties perceived by the majority in Lee as to the substantive use of the statement of the codefendant there do not exist in this case, even with the unredacted statement. For constitutional purposes, the unredacted confession, if considered by the jury as substantive

evidence against Respondent, was properly so considered. Certainly, then, the redacted confession, which only details the involvement of Martin and Williams, cannot be viewed as violating principles of confrontation.

In sum, the confession, both as redacted and as unredacted, contains, under the circumstances, substantial indicia of reliability, so as to overcome the presumption of inadmissibility against Respondent. Even if a doctrine of contextual implication under Bruton is recognized and applied to this case so as to overcome the presumption that a jury will follow the instructions given it, no rights of the Respondent were violated.

CONCLUSION

Wherefore, Petitioner respectfully requests that the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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TAB/dh